
**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local)	
Competition Provisions in the)	CC Docket No. 96-98
Telecommunications Act of 1996)	
)	
Inter-Carrier Compensation)	CC Docket No. 99-68
for ISP-Bound Traffic)	

TO: The Commission

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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**Filed Through ECFS
April 27, 1999**

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SUMMARY¹

CLEC commentators and their supporters in this proceeding encourage the Commission to create bizarre and divergent regulatory results, motivate uneconomic behavior and violate long-standing, sound jurisdictional and regulatory principles. There is perhaps no worse collection of warped interpretations of the 1996 Act or self-serving schemes to be found than in their comments.

The CLEC commentators advocate ignoring the jurisdiction bestowed upon the Commission over 50 years ago in favor of alleged expediency in resolving compensation issues in one forum. They argue in favor of a compensation method that treats all traffic alike – local and interexchange included – when they must know that the Commission has specifically ruled that local traffic and interexchange traffic are treated differently from one another and are governed by completely different provisions of the Act. They ignore the fact that the Commission's historic ESP exemption spawned regulatory treatment of ESPs (and now ISPs) for the precise reason that those entities enjoyed the use of LEC networks for access, but did not pay traditional access charges. They also ignore that this special regulatory treatment (found in the Part 69 rules) presents a golden opportunity for the Commission to take a firm hold of the intercarrier compensation issue and resolve it, efficiently and fairly, for all concerned.

Even more incredible is the CLEC commentators' insistence that – now that the Commission has deemed Internet-bound traffic to be significantly *interstate* in nature – it should order that traffic to be assigned to the *intrastate* jurisdiction for separations

¹Abbreviations used in this Summary are referenced within the text.

purposes. SBC is not alone in voicing its serious concern over such a jurisdictional mismatch, and urges the Commission to reject this patently improper suggestion.

As a solution to the complicated problem of determining how best to resolve intercarrier compensation issues for Internet-bound traffic, SBC urges the Commission to take a hard look at – and accept SBC’s suggested compensation method. A meet-point compensation arrangement, promulgated under existing Rule 69.115, would be workable, equitable and effective to ensure that LECs who originate Internet-bound traffic are fairly compensated for the use of their networks for access. In addition, and no less significantly, a meet-point billing arrangement, structured as a per-line monthly surcharge assessed on ISPs, would steer clear of the dangerous area of usage-based charges on Internet use, and would further the Commission's clearly articulated goal of encouraging Internet growth.

Competition in the local telecommunications marketplace is here. It has been an arduous process for all interested parties, incumbents, entrants, end users and regulators alike. What is needed is continued strong leadership on difficult issues, like this one. SBC is confident that the Commission will rise to the challenge again, accept full responsibility for the Internet-bound traffic intercarrier compensation question, and adopt a solution that is supported by law, regulatory precedent and sound public policy.

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Pursuant to the Notice of Proposed Rulemaking² issued February 26, 1999 by the Federal Communications Commission ("Commission"), SBC Communications Inc. ("SBC") hereby replies to comments filed regarding the Commission's proposed methods for determining appropriate inter-carrier compensation for ISP-bound traffic and related issues referenced in the Commission's NPRM.

Predictably, CLEC commentators and other competitors of ILECs, such as AT&T, advocate the following actions by the Commission, all of which are unsupported by governing federal law and against public policy interests:

1. Relinquishment of responsibility for determining inter-carrier compensation for Internet-bound traffic to the negotiation and arbitration process under state commission purview, pursuant to Sections 251 and 252 of the Act;

²*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 and *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 ("Declaratory Ruling") and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("NPRM"), FCC 99-38 (rel. February 26, 1999).

2. Assignment of Internet-bound traffic costs to the intrastate jurisdiction for separations purposes; and

3. Application of reciprocal compensation, on a per-minute basis, to termination of Internet-bound traffic.

These commenting parties' proposals and arguments further their own interests at the expense of compliance with the Act, preservation of the integrity of the separations regime, and the public interest in rational economic behavior in the telecommunications marketplace.

1. Governance of Inter-carrier Compensation

a. The Commission must resist the attempts of certain commentors to convince the Commission to abdicate governance of these compensation issues to the states.

Parties aligned with CLECs urge the Commission to divert the issue of intercarrier compensation for this interstate traffic to state commissions under Sections 251 and 252 for different reasons, all of which are equally specious.

(1) Several CLEC commentors baldly assert that inter-carrier compensation for Internet-bound traffic is within the purview of Section 251/252 interconnection negotiations – even though the Commission has ruled that it does not terminate locally – because Section 252 does not limit matters that parties may include in their interconnection agreements or that states may arbitrate.³ This assertion is incorrect (the Commission has definitively ruled that Section 251(b)(5) applies only to the transport and termination of *local* telecommunications traffic⁴) and Section 252 does not "stand alone"

³ See, e.g., Comments of CTSI, Inc. at 9.

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers*, CC Docket No. 96-98, First Report and Order ("Local Competition Order")(rel. August 8,

from Section 251. These commentators also ignore the express language of Section 252(d)(2), which provides that a state commission shall not consider terms and conditions for reciprocal compensation to be just and reasonable unless, among other things, the compensation is for the recovery of costs associated with the transport *and* termination on a carrier's facilities that originate on the other carrier's network. The Commission has ruled that Internet-bound calls do *not* terminate at the LEC serving the ISP;⁵ therefore, this argument must fail, under both Sections 251 and 252.

Section 251, by its terms, governs interconnection and sets forth the duty of incumbent LECs to negotiate interconnection agreements "in accordance with Section 252."⁶ Section 252 serves as the implementing provision for Section 251. It is meaningfully entitled, "*Procedures for the Negotiation, Arbitration, and Approval of Agreements*" (emphasis added). The CLEC commentators' argument does violence to the intended purpose of Section 252 when they contend that it essentially grants the states carte blanche authority to determine any issue that might be presented in an arbitration or interconnection agreement, regardless of jurisdictional boundaries.

Section 251(i) specifically states that Section 251 does nothing to limit or otherwise effect Commission jurisdiction under Section 201. In its Local Competition Order, the Commission very explicitly set out the jurisdictional boundaries of Sections 251 and 252, stating,

Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the distinction between charges for

1996) at para. 1034.

⁵Declaratory Ruling at para. 12.

⁶47 U.S.C. §251(c)(1).

transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.⁷

This determination is consistent with Congress' intent to preserve Commission jurisdiction over interexchange traffic compensation issues. Throughout the legislative history of the 1996 Act, there are references to this intent, an example of which follows:

The obligations and procedures prescribed in [Section 251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under Section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in [Section 251] is intended to affect the Commission's access charge rules.⁸

The Communications Act of 1934 grants the Commission authority over interstate communications.⁹ Section 201 of the Act grants the Commission authority over interstate carrier charges, among other things. In fact, it was under Section 201 that the Commission created the ESP exemption and the Part 69 rules that apply to ESPs/ISPs as end users.¹⁰ Nothing in Sections 251 and 252 grants states authority to regulate interstate access services or pricing for those services. Maintaining the Commission's statutory authority in no way diminishes the efficacy of Sections 251 and 252 to promote the competitive purposes of the 1996 Act.

(2) Other commenting parties tout the wisdom of assigning governance of Internet-bound traffic compensation issues to state 251/252 processes because it would force the parties to hold a single set of negotiations and participate in a single arbitration

⁷Local Competition Order at paras. 1033-1034.

⁸Conference Report on S. 652 at 117. *See, also*, Senate Report on S. 652 (Report No. 104-230) at 19.

⁹47 U.S.C. §§151 and 152.

¹⁰*In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 766 (1983).

for all disputes regarding interconnected traffic.¹¹ But the possibility of expediency is no reason to court the disastrous conflicts likely to result from assignment of interstate compensation issues to a process designed and intended for local traffic. As the Vermont Public Service Board describes in detail in its Comments, there are any number of entirely possible and equally problematic scenarios that could arise from such a scheme, including several that would result in discriminatory cost burdens on Internet end users.¹²

(3) Commenters offer another theory under the deceptively simple title of "a minute is a minute." Under this theory, CLECs and others argue that local reciprocal compensation assessed under Sections 251 and 252 is equally applicable to Internet-bound traffic because its carriage is "functionally equivalent" to the carriage of other traffic. For several reasons, not the least of which is that the Commission has discredited this theory, this argument, too, must be rejected.

b. Abandoning governance of inter-carrier compensation for Internet-bound traffic to the state negotiation/arbitration process would wreak havoc on jurisdictional and policy concerns.

Even if Sections 251 and 252 were applicable to Internet-bound traffic compensation, which they are not, and even if state commissions had jurisdiction over inter-carrier compensation for interstate traffic jointly provided, which they do not, the Commission's suggestion that the best place for resolving associated compensation issues is in the state negotiation/arbitration process would have disastrous policy results. The Commission has ruled that Section 251(b)(5) governs only *local* telecommunications traffic.¹³

¹¹See, e.g., Comments of AT&T Corp. at 6.

¹²Comments of the Vermont Public Service Board at 9.

¹³Local Competition Order at 13.

The Commission recognized ESP/ISP traffic to be access traffic and created an access charge exemption for it, all pursuant to its authority under Section 201 of the Act.

The Commission has reiterated this concept in the Declaratory Ruling, stating,

Section 251 of the Act makes clear that interstate traffic remains subject to the Commission's jurisdiction under Section 201. *See* 47 U.S.C. §251(i) ('Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.')¹⁴.

Unbelievably, in the face of these rulings, certain commenting parties still urge the Commission to relegate power over interstate access compensation issues for Internet-bound traffic to the states.¹⁵ As explained above, this position conflicts with the Commission's concrete determination that such traffic is within its jurisdiction, and expands Congress' plan for purposefully limited state involvement in the interconnection process to matters firmly within the Commission's jurisdiction under Section 201 of the Act. In effect, as Frontier points out in its Comments,¹⁶ this position leads to at least the following highly undesirable results:

(1) First, if this line of reasoning is taken to its logical conclusion, state commissions arguably have the authority to vary exchange carriers' interstate access tariffs, simply because such a provision was contained in a state-arbitrated interconnection agreement;

¹⁴Declaratory Ruling at para. 7, n. 18.

¹⁵*See, e.g.,* AT&T at 6; Comments of GST Telecom, Inc. at 7-8; Comments of the Competitive Telecommunications Association at 10.

¹⁶Comments of Frontier Corporation at 6 ff. Frontier's position is particularly significant because it operates in the marketplace, through various subsidiaries, as an ILEC, CLEC, IXC *and* internet service provider. *See* Frontier at 1.

(2) Second, it violates the long-established statutory principle of dual sovereignty by forcing state regulators to administer and enforce a uniquely federal plan of compensation for jurisdictionally interstate traffic;¹⁷ and

(3) Third, it skews economic incentives in a way that will likely harm parties who are strangers to the negotiation or arbitration proceeding(s) administered by the states.¹⁸ Just one example of this distortion would be a negotiation in which an interexchange carrier with a CLEC interest might decide not to collect reciprocal compensation for terminating ISP-bound traffic in return for reductions in interstate switched access charges. As a result the IXC would artificially gain a cost advantage over its competitors (strangers to the transaction, as are their customers) through the negotiation process alone.

c. Several state commissions themselves argue that this traffic, now declared largely interstate by the Commission, should be governed consistently with that finding.

The Commission's definitive assertion of jurisdiction over Internet-bound traffic is, for the most part, welcomed by the state commissions who filed comments in this proceeding. But the state commenting parties expressed serious concerns about the Commission's proposal to assign related costs to the intrastate jurisdiction as well as about its inclination to allow state commissions to govern inter-carrier compensation for this traffic under Sections 251 and 252.

Perhaps the most compelling comments were filed by the Vermont Public Service Board. Vermont urges the Commission to assert full authority over this largely interstate traffic, rather than split jurisdiction from responsibility and abandon important

¹⁷See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

decisions about inter-carrier compensation to the states.¹⁹ Vermont provides examples of likely results of this split between jurisdiction and responsibility which give rise to legitimate and serious concerns. Because of the complexity of state ratemaking decisions, and the fact that states must balance the economic interests of several classes of customers as well as carriers in rendering their decisions, there is almost unlimited potential for conflict with important federal policy goals, including the goal of promoting the growth of the Internet.²⁰

Other state commission commenting parties, including Florida and Indiana, while agreeing with some assignment of responsibility to state commissions for determining inter-carrier compensation, specifically warned against the assignment of cost recovery responsibility to the states for what has been designated an interstate service.²¹ Although this point pertains to the separations issue, it underscores the need for the Commission to ensure that inter-carrier compensation issues for this traffic are handled consistently by the proper jurisdictional authority and not relegated to potentially fifty different state decisionmakers.

Wisconsin and Missouri, although they do not specifically urge the Commission to accept full responsibility for determination and governance of inter-carrier compensation for Internet-bound traffic, both indicate their overall concern that this issue be handled consistently, and pursuant to national rules, carefully crafted by this

¹⁸See Frontier at 9-10.

¹⁹Vermont Public Service Board at 6, 14.

²⁰*Ibid* at 8-10.

²¹See Comments of the Indiana Utility Regulatory Commission (IURC) at 1, 3-5; Florida Public Service Commission Comments on Notice of Proposed Rulemaking at 9-10.

Commission.²² Wisconsin even advocates that states not be permitted to take any action in this regard until the issue is decided.²³

2. Separations Treatment

a. Costs attributed to this interstate traffic must be assigned to the interstate jurisdiction.

In the Declaratory Ruling, the Commission characterized "ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site," and concluded that the traffic was "largely interstate."²⁴ While some commenting parties dispute this conclusion regarding the jurisdictional nature of ISP-bound traffic, it must be assumed -- absent an appeal and reversal of the Declaratory Ruling -- that the jurisdictional nature of ISP-bound traffic is largely interstate for purposes of addressing the NPRM's issues regarding the impact of the ruling on the separations regime.

The NPRM seeks comment on the jurisdictional separations treatment of the costs and revenues associated with ISP-bound traffic. The NPRM does not propose that such costs and revenues should be treated as either interstate or intrastate, but it does make

²²Wisconsin State Telecommunications Association by its Wisconsin Internet Service Provider Division (WSTA: WI-ISP) Response to FCC Notice of Proposed Rulemaking in CC Docket 99-68 at 2; Comments of the Missouri Public Service Commission.

²³WSTA: WI-ISP Comments at 2 (proposing "a moratorium of *at least* two years, for implementation rules or regulations on Internet traffic prior to a thorough study of the implications of such regulation," to allow the Commission time to develop an approach to inter-carrier compensation for this traffic. Emphasis in original.) While SBC does not agree that a two-year delay is in the best interest of the affected parties or the marketplace, it agrees that allowing state decisions inconsistent with the Commission's Declaratory Ruling to stand, and allowing states to continue to govern inter-carrier compensation under Sections 251 and 252, while the Commission develops an approach to this issue, is inherently dangerous, as well as unsupported by the Act.

²⁴Declaratory Ruling at paras. 13 and 1.

clear that the Commission does not intend to permit a mismatch between costs and revenues.²⁵

Some commenting parties, such as AT&T, recommend that costs should be assigned to the intrastate jurisdiction.²⁶ In their Comments, the state members of the Separations Joint Board ("Joint Board State Members") warn against an "inappropriate mismatch of jurisdictional allocations," and urges the Commission to ensure that the costs of Internet-bound traffic are properly assigned to the interstate jurisdiction.²⁷

As SBC deploys measurement capabilities to identify Internet-bound traffic, SBC is treating this traffic as one call and is assigning it to the interstate jurisdiction as necessitated by the Commission's Declaratory Ruling²⁸ and required by Part 36 of the FCC Rules. This treatment is consistent with separations policy and requirements, as noted by the Joint Board State Members, because:

- (1) The sole purpose of separations is to determine the scope of the Commission's and state regulators' jurisdiction to prevent confiscation or double recovery of a regulated carrier's assets;
- (2) In general, the separations regime facilitates this purposes by, uniformly for all carriers, determining the jurisdiction and the responsibility for recovery of a regulated carrier's cost;
- (3) Since Internet-bound traffic has been determined to be interstate by the Commission, under the Commission's rules the associated costs should be assigned

²⁵NPRM at para. 36.

²⁶Comments of AT&T Corp. at 19.

²⁷Comments of the State Members of the CC Docket 80-286 Federal-State Joint Board on Separations at para. 2-3.

²⁸Declaratory Ruling at paras. 10-12.

to interstate (not intrastate) and the responsibility for rate recovery is the Commission's, not the state regulators; and

(4) Any other action by the Commission would result in each jurisdiction (federal or state) adopting its own interpretation of where costs should be assigned and recovered. This type of unilateral state-by-state regulatory determination would destroy the uniform Part 36 assignment of carriers' costs and would result in cost assignments that were larger than the total of a carrier's costs or that did not add up to a carrier's costs. This lack of uniformity, warn the Joint Board State Members, will likely lead to jurisdictional disputes between regulators, litigation and, ultimately, loss of valuable time that could have been spent advancing the best interests of consumers.

In effect, a ruling that pushed all the costs on the intrastate jurisdiction, as suggested by AT&T, would merely pay lip-service to the *interstate* jurisdictional nature of the traffic while "ignor[ing] altogether the actual uses to which the property is put"²⁹ in the assignment of the revenues and costs to the *intrastate* jurisdiction in violation of the Supreme Court's long-standing decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 151 (1930). Assigning the costs for this largely interstate traffic to the intrastate jurisdiction would directly contradict the Declaratory Ruling's primary holding. Therefore, it is not an exaggeration to say that AT&T's proposal, if adopted, would work a *de facto* reversal of the Declaratory Ruling.

²⁹*Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 150-151, 51 S.Ct. 65, 69 (1930). The *Louisiana Public Service Commission v. FCC* decision later reemphasized the importance of maintaining the integrity of the Congressionally-mandated separations process, designed to address the tensions between the dual jurisdiction created by the Communications Act. 476 U.S. 355, 106 S.Ct. 1890 (1986).

Smith does not compel the use of any particular method of assigning ISP-bound traffic costs and revenues to interstate – and "extreme nicety is not required"³⁰ – but it does require "reasonable measures."³¹ Assigning the costs of ISP-bound traffic to the intrastate jurisdiction, as suggested by AT&T, would fly in the face of the holdings of *Smith* and its progeny. These long-standing separations authorities require some estimate of the value of the property used in interstate service and this Commission has now clearly determined that ISP-bound traffic is substantially interstate in nature.³²

If the Commission does not accurately recognize the interstate jurisdictional nature of ISP-bound traffic in the separations process, and ISP-bound traffic is thus assigned to the intrastate jurisdiction, that would create virtually the identical problem as presented to the Court in *Smith* -- if the costs and revenues of ISP-bound traffic were treated as intrastate, then, in effect, the states would be assigned the costs of ISP-bound traffic without regard to the interstate use to which the carriers' property is put as a result of ISP-bound traffic.

In this proceeding, AT&T proposes that the costs of ISP-bound traffic should not be properly allocated, but, instead, that those costs be assigned entirely to the intrastate jurisdiction. Assignment of ISP-bound traffic to the intrastate jurisdiction would place increasingly greater cost recovery burden on intrastate services. *Smith* does not permit this,³³ especially in the case of a service that the Commission has already determined to be predominantly interstate in nature.

³⁰*Smith*, 282 U.S. at 150.

³¹*Id.* Reasonable measures, as previously adopted by this Commission, are embodied in the Part 36 Rules.

³²Declaratory Ruling at para. 18.

³³In *Smith*, the state failed to separate Illinois Bell's property between the jurisdictions and instead determined rates based on Illinois Bell's unseparated costs. The

AT&T tries to mislead the Commission by suggesting that the assignment of Internet-bound traffic costs to the interstate jurisdiction contradicts the ESP access charge exemption, citing a 1989 Notice of Proposed Rulemaking for this proposition.³⁴ The language proffered by AT&T is woefully out of context. AT&T quotes the following passage from the ONA NPRM in support of its assertion that assigning Internet-bound traffic costs to the interstate jurisdiction would be a "violation" of the Commission's "rules:"

ESP traffic . . . is classified as local traffic for separations purposes, with the result that [traffic sensitive] costs associated with ESP traffic are apportioned to the intrastate jurisdiction.³⁵

A closer look at this single sentence from the NPRM indicates that it is merely an observation by the Commission in the context of a larger discussion about the characterization of this type of traffic during the time when procedures weren't in place to identify when a call was destined for an ESP/ISP.³⁶ It is not, as AT&T suggests, a mandate that ESP traffic subject to the access charge exemption must be assigned to the local jurisdiction. In fact, in the Declaratory Ruling, the Commission itself cites this short passage from the ONA NPRM as a description of the "traditional" characterization

Supreme Court ruled that this was an unlawful allocation, cautioning that, "unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden." 282 U.S. at 151.

³⁴AT&T at 19-20 (citing *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Notice of Proposed Rulemaking ("ONA NPRM"), 4 FCC Rcd 3983, 3987 (1989)).

³⁵AT&T at 20 (citing ONA NPRM at 3987.)

³⁶Then, as now, a seven-digit dialing pattern to access on ESP/ISP would result in the call being identified as local and assigned to the intrastate jurisdiction, absent intervention from the carrier to correctly assign the call to the interstate jurisdiction. At the time of the ONA NPRM, there was no ability to separately identify these calls as going to an ESP/ISP – and, thus, no intervention capability.

of this type of traffic as intrastate for separations purposes.³⁷ Simply stated, there is no Part 36 rule requiring that ESP traffic be assigned to the local jurisdiction.³⁸

Certainly, SBC is not suggesting that if ISP-bound traffic included more than a *de minimis* amount of intrastate usage it would be improper to assign an appropriate percentage to the intrastate jurisdiction, were it reasonably feasible to determine the amount of intrastate usage. However, the degree of intrastate usage is *de minimis* and, as SBC and other commenting parties have shown,³⁹ there is no practical method of accurately determining the intrastate versus interstate portion of Internet traffic at this time. Thus, today's ISP-bound traffic should be assigned entirely to the interstate jurisdiction.

Consistent with the interstate assignment of interstate traffic, SBC submits that jurisdiction over all Internet-bound usage is vested in the Commission, and that the Commission should establish a federal framework to govern the cost recovery mechanism for the interstate use of local networks. SBC suggested in its Comments that the Commission consider a meet point billing arrangement.⁴⁰ Several commenting parties also propose a federal cost recovery mechanism.⁴¹ For example, BellSouth suggests that the ISP's interstate dial-up connection could be added to the interstate access tariff at the

³⁷Declaratory Ruling at para. 5.

³⁸To the contrary, under Part 36 rules, traffic – sensitive (“TS”) costs are separated on the basis of relative use, which, in the case of Internet-bound traffic, the Commission has found to be largely interstate. Interestingly, the treatment of TS traffic is addressed in the very same paragraph as the one excerpted by AT&T in support of its flawed assertion.

³⁹*See, e.g.*, Comments of Bell Atlantic at 7-8; Comments of BellSouth at 10-12; NTCA at 15; SBC at 24-28; Comments of John Staurulakis, Inc. at 4-5; US WEST at 18; Comments of GTE at 18ff.; Comments of the National Telephone Cooperative Association of America at 7 ff.

⁴⁰SBC at 22 ff.

⁴¹*See, e.g.*, Frontier at 11-13; NTCA at [16-18]; Vermont at 12.

same business exchange rates that ISPs currently obtain from intrastate tariffs.⁴² Consequently, without any increase in the ISP's rates, both the costs and the revenues of the ISP-bound traffic over these connections would be assigned to the interstate jurisdiction and the Commission would be able to achieve its goal of avoiding a mismatch between revenues and costs.

3. Inter-carrier Compensation Method

- a. The Commission must reject efforts to persuade it to apply Section 251/252 reciprocal compensation to Internet-bound traffic, which it has properly declared to be largely interstate and under Commission jurisdiction.**

As SBC has explained in detail in its Comments, filed earlier in this proceeding,⁴³ the Commission's Declaratory Ruling exploded nearly all of the theories under which CLECs have argued, and state commissions have found, that reciprocal compensation lawfully applies to Internet-bound traffic. Furthermore, allowing the imposition of reciprocal compensation obligations against originating LECs harms the public interest by causing irrational economic behavior, retarding local competition and discouraging innovation.⁴⁴

Other commenting parties attempt to divert attention from the real issues in this proceeding by arguing that Internet-bound traffic should be covered by the reciprocal compensation methodology because, "[f]rom the perspective of a carrier's equipment, data and voice traffic handled by conventional circuit-switched networks are indistinguishable . . . [and ILECs] cannot demonstrate that the costs of transporting and terminating data traffic differ categorically from the costs of transporting and terminating

⁴²BellSouth at 8.

⁴³SBC at 14-18.

⁴⁴*Id.* at 19-23.

order voice traffic."⁴⁵ This argument is completely spurious because it ignores the simple, but crucial, fact that the issue in this proceeding is about determining the method by which carriers that provide undeniably interstate access service to ISPs are to be fairly compensated for that service. The Commission debunked this "minute is a minute" theory in its Local Competition Order, stating,

We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. . . . We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.⁴⁶

Furthermore, the AT&T argument completely ignores the fact that Internet-bound traffic, pursuant to the Commission's Declaratory Ruling, *does not terminate* at the ISP as does "conventional voice traffic bound for other business users with large volumes of inbound traffic."⁴⁷

b. Expanding meet-point billing arrangements and making a modest amendment to the Part 69 access rules, would yield fair compensation to LECs jointly providing transport and termination of Internet-bound traffic, and would not hamper growth of the Internet.

SBC is mindful (as are other commenting parties) of the pressure on the Commission to resolve this complex issue without increasing prices charged to Internet users. With two formal pieces of proposed legislation already circulating in Congress, each seeking to limit the Commission's authority to impose regulatory costs on information service providers, there is no escaping the fact that any attempt to recover

⁴⁵See, e.g., AT&T at 10-11.

⁴⁶Local Competition Order at para. 1033.

⁴⁷AT&T at 11.

compensation from ISPs will be met with criticism from some quarters. But the facts remain:

(1) ISPs are receiving access services from LECs, albeit subject to special treatment under the ESP access charge exemption;

(2) LECs are entitled to adequate compensation for providing access service; and

(3) Originating LECs are not receiving adequate compensation for jointly providing access service to ISPs.

In order to assist the Commission in resolving this difficult issue, SBC has proposed a specific compensation method – meet-point billing via an extension of the special access surcharge described in Part 69.5(c) and 69.115. As an example, Part 69 could be modified as follows:

(1) Where multiple LECs jointly provide interstate access to an ISP, ISP-bound traffic should be treated as 100% interstate;

(2) Each LEC will be responsible for identifying ISP usage generated by its end users;

(3) Average minutes of use per line could be calculated by performing a usage study for the lines used by known ISPs. As an alternative, 9000 minutes of use (MOUs) per line could be used to calculate an end user surcharge. The Commission has historically relied upon 9000 MOUs per line/trunk as a surrogate when actual measurements are not known.⁴⁸

⁴⁸This surrogate has previously been recognized by the Commission as reasonable and adopted. See, e.g., *In the Matter of Transport Rate Structure and Pricing; Petition for Waiver of the Transport Rules filed by GTE Service Corporation*, 7 FCC Rcd 7006, 7036, Report and Order and Further Notice of Proposed Rulemaking (1992)(citing *In the*

- (4) Establish an average per minute charge to cover switching and transport;
- (5) Calculate the ISP surcharge by multiplying the average usage per business line by the average per-minute charge;
- (6) ISP usage divided by the usage-per-line developed in (3), above, yields a number of surrogate business lines, to be multiplied by the end user surcharge to arrive at total ISP surcharge revenues.

This proposal will withstand challenges on several important fronts, and will advance significant policy goals.

- (1) There is strong precedent for access surcharge treatment of ISP traffic;
- (2) The Commission's existing rules already permit exactly this type of compensation solution;
- (3) The logic behind this compensation method is sound – it provides for recovery of compensation in the same way as other surcharges; and
- (4) This surcharge does not threaten the Internet.

(i) This compensation method is consistent with the preservation of the ESP/ISP exemption and with the Part 69 Rules.

The rationale behind this surcharge method derives from the fact that ISPs enjoy an exemption from access charges, established for ESPs over a decade ago by the Commission. The ESP exemption relieves ESP/ISPs from Part 69 switched access carrier-type charges that provide compensation for the interstate use of common lines, end office switching and transport, i.e., Presubscribed Interexchange Carrier Charge

Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 834, 862 (1984)). In a later Order, the Commission determined that actual minutes of use should be used for the calculation of common transport pieces rather than the 9000 MOUs it had originally adopted. Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May

("PICC"), Common Carrier Line ("CCL") charge, local switching and switched transport charges. However, the ESP exemption does not totally exempt ESPs/ISPs from the payment of interstate access charges. Part 69 requires ISPs to pay the access charges that apply to end users, in addition to intrastate business line rates.⁴⁹ The subscriber line charge (SLC) and the special access surcharge are two access charges that apply to end users, including ISPs.

As SBC pointed out in its Comments,⁵⁰ the special access surcharge was established to act as a surrogate for the access revenue forgone as a result of the "leaky PBX" phenomenon. Leaked traffic generally occurs when a user interconnects local exchange services with private line services. The Commission identified ESPs/ISPs as significant contributors of "leaked" traffic:

A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers. Hereafter, we shall use the term "leaky PBX" to denote the generic problem just described, whether the "leak" occurs through a PBX or through another mechanism or instrumentality.⁵¹

In spite of the exemption from switched access charges, the Commission determined that special access surcharges should apply to ESPs/ISPs. The special access

16, 1997) at para. 206.

⁴⁹In fact, although many commenters and state commissions repeatedly describe the ESP exemption as a practice that "treats" ESP/ISP traffic "as local," the Commission's own description of how the exemption was implemented is far more limited. In the ONA NPRM, in which the Commission engages in a lengthy discussion of the history of the exemption, the Commission specifically notes, "The current exemption for ESPs is implemented by including ESPs in the definition of 'end user' in our access charge rules." ONA NPRM at 3988 (footnote omitted, emphasis added).

⁵⁰SBC at n.45.

⁵¹*In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 712 (1983).

surcharge is applied to the user's private line services on a per-voice grade equivalent channel basis for those private line services that customers certify are capable of leaking. However, in the case of ESP/ISPs, the surcharge should always apply because the Commission, through the ESP exemption, has effectively endorsed a service configuration that is meant to "leak."

The Commission recognized early in the development of its access charge rules that a specific LEC, in reality, may not provide both private line services and local business service to a specific user. Since that LEC is not providing private line service to that user, upon which it could charge the permitted special access surcharge to recover compensation for the use of its network for access, the Commission decided to permit such a LEC to file a surcharge that could be applied to the end user's business exchange services for recovery of that otherwise lost access compensation.⁵² An important policy goal was achieved by this development -- the Commission designed its access charge plan so that an end user could not avoid compensating a LEC for the interstate use of its network by purchasing private lines from another supplier or by constructing its own facilities.

As a formal matter, under Part 69.115(d), a LEC is permitted to develop an end user surcharge that can be applied to local exchange services that carry "leaked" traffic.⁵³ It is this type of arrangement that SBC is proposing be adopted by the Commission to

⁵² *Id.*

⁵³ This surcharge applies to end users, including ISPs, in lieu of the twenty-five dollar surcharge described above. Part 69.115(b) requires that the surcharge be a reasonable approximation of the switched access charges that would have been paid for the use of common lines, end office facilities and transport facilities an ISP needs to access its subscriber. Part 69.115(c) permits LECs that are unable to estimate actual "leaked" traffic to charge twenty-five dollars per-voice grade equivalent channel.

solve the question of how to determine intercarrier compensation for Internet-bound traffic.

(ii) Logistics

This meet point billing arrangement would apply when two LECs jointly provide interstate access to an ISP through the ESP exemption (See Figure 1, attached.) Under this arrangement, the LEC serving the ISP would continue to receive its access compensation directly from the ISP through the charges illustrated in Figure 1. The Commission should modify Part 69.115(d) to permit the LEC that serves the ISP's subscriber to bill the end user surcharge for the interstate use of its end office switching and transport facilities (*See* Figure 1). Both LECs have incurred costs to provide interstate access to an ISP and thus should receive a share of the compensation permitted under the ESP exemption.⁵⁴ This meet point billing arrangement maintains the ESP exemption and is already contemplated by Rule 69.115.

Optimally, the LEC serving an ISP's subscriber should bill the modified end user surcharge directly to the ISP. This arrangement would require the LEC serving the ISP to share information that would enable the other LEC to render its bill to the ISP.⁵⁵ In some

⁵⁴As described in Figure 1, no other special access surcharges would apply.

⁵⁵Internet-bound usage can be identified so that it can be properly assigned to the interstate jurisdiction and removed from the intrastate jurisdiction (and, consequently, from local reciprocal compensation billing.) To identify this usage ISP Internet access numbers must be first identified, and then all Internet-bound usage associated with those numbers is collected and identified. The preferred method of identifying these numbers would be for the LEC that connects the ISP to the network to identify the access numbers and provide them to the LEC that originates ISP customer Internet-bound usage. SBC agrees with the comments of John Staurulakis, Inc., that the Commission may and should consider requiring LECs serving ISPs to identify ISP Internet access numbers. This joint effort would provide the most efficient and accurate method of identifying Internet-bound usage. If this joint effort fails, the LEC originating the Internet-bound traffic can, with the deployment of measurement tools, identify the ISP's Internet access numbers and, thus, the Internet-bound usage.

cases, the LEC serving the ISP may not desire to share what could be perceived to be competitively sensitive information. Therefore, the Commission should also establish an option that permits the LEC serving the ISP's subscriber to bill the modified end user surcharge to the LEC serving the ISP. This option should then allow the LEC serving the ISP to flow through the modified end user surcharge to the ISP.

The modified end user surcharge described above should be established on a flat rated basis in a manner that is consistent with the existing Part 69.115(d) rule. The modified end user surcharge could apply to surrogate business lines since the LEC serving the ISP's subscriber does not provide the actual intrastate business lines to the ISP. Surrogate business lines could be determined based upon the amount of Internet-bound traffic that originates on a LEC's network and that is delivered to the LEC serving the ISP.

c. There is no need for radical modifications of separations rules or policies to properly assign costs for this traffic or to effectuate the SBC surcharge proposal.

A number of commenting parties appeared to assert that separations changes were required to assign Internet-bound traffic to the interstate jurisdiction.⁵⁶ However, no such changes are required. As the Joint Board State Members and the Telephone Association of New England point out in their Comments, assignment of Internet bound traffic to interstate (or reassignment to interstate from intrastate) does not require a Part 36 change. It simply requires a recomputation of Part 36 allocation factors.

Even though separations changes are not required to assign Internet-bound traffic to interstate, the Joint Board should, nonetheless, consider the following issues:

⁵⁶Comments of Cincinnati Bell at 6, Public Utility Commission of Texas at 9, Vermont Public Service Board at 12-13.

(1) The Joint Board should determine whether alternative procedures are available to identify total Internet-bound traffic. In particular, the Joint Board should consider whether a rule is necessary which would require LECs or CLECs connected to ISPs to provide the Internet access number of those ISPs to interconnected LECs or CLECs who originate Internet bound traffic to those ISP access numbers.

(2) A number of commenting parties also suggested that changes to the Part 36 loop allocation (for originating end users' loops) might be appropriate to account for the interstate assignment of Internet bound usage.⁵⁷ Although, the Joint Board might want to evaluate the Part 36 loop allocation procedure, SBC does not believe that changes are required. This allocation is unrelated to usage levels including Internet-bound traffic. The allocation is simply a fixed percentage to Interstate (25%) and Intrastate (75%) which has been determined by the Commission and past CC Docket 80-286 Joint Boards to be reflective of the level of loop costs which would appropriately be recovered by the respective jurisdictions.

(3) The Commission ruled that Internet-bound usage was largely interstate; however, in the same document, in paragraph 36 of the NPRM, the Commission stated that the costs and revenues associated with the ISP connections to the network should continue to be accounted for as intrastate. SBC is complying with the Commission ruling for the ISPs connections with the caveat that, unless a Part 36 rule change is adopted, SBC is required to assign 25% of the loop portion of the ISP connection to interstate. This 25%

⁵⁷The State Members of The CC Docket 80-286 Joint Board, The Indiana Utility Regulatory Commission and the Vermont Public Service Board.

is now recovered via interstate rates. Otherwise, the costs of the connection and the revenues are assigned to intrastate, as directed by the Commission. The Joint Board may wish to evaluate whether the costs and revenues for this connection should be reassigned to interstate. This revision would require new federal tariff rules which could potentially mirror intrastate rate levels now utilized for ISP connections.⁵⁸

(4) Because Internet-bound traffic is interstate in nature, local reciprocal compensation payments or expenses for Internet bound traffic are inappropriate. However, to the extent these payments continue to exist, they may not be assigned by carriers uniformly to the same jurisdiction. SBC is now assigning these costs to intrastate because it is state commissions that inappropriately included Internet-bound interstate access traffic in local reciprocal compensation obligations. However other carriers may have decided, subsequent to the issuance of the Declaratory Ruling, that these expenses should be assigned to interstate because the Commission appears to have allowed the possibility of continuing local reciprocal compensation for interstate access traffic. SBC cannot disagree with this logic, but believes, as does the Indiana Commission and the Joint Board State Members, that Part 36 requires uniformity of assignment. Consequently, the Commission and Joint Board should evaluate this issue to ensure uniformity of assignment by carriers.

⁵⁸This approach is advocated by BellSouth at 8.

d. The surcharge method proposed by SBC resolves many problematic issues raised by commentors.

Many commenting parties, on both sides of this argument, complained of the difficulties encountered in negotiating these complex compensation issues, the inevitable delay that results from the negotiation and arbitration processes, the dangers of developing compensation models that require complex calculations or measurement, and the like.⁵⁹ The access surcharge model proposed by SBC in its Comments and these Reply Comments is not complicated, requires no radical modification of existing rules or policies, and does not burden Internet service providers or end users with the potential for usage-based charges. The Commission, by adopting and implementing this proposal, could address the fair business concerns of most parties, continue to encourage competition in the local telecommunications marketplace, and even satisfy critics who fear that the Internet will be damaged by Commission regulation.

Conclusion

The Commission should not follow the advice of commenters who urge it to defer governance of intercarrier compensation issues for Internet-bound traffic to the Section 251/252 process, with its attendant reciprocal compensation provisions. For all of the reasons stated above, proceeding down that path will result in a drastic and unpleasant detour from the Commission's plan to encourage the growth of the Internet as well as implement the local competition goals of the 1996 Act. The meet-point billing arrangement proposed by SBC, constructed within the confines of the ESP exemption

⁵⁹*See, e.g.*, GST Telecom at 19; Telecommunications Resellers Association at 8.

and the Part 69 rules, will withstand challenges and will serve instead of obstruct those goals.

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Filed Through ECFS
April 27, 1999

Certificate of Service

I, Mary Ann Morris, hereby certify that the foregoing “Reply Comments of SBC Communications, Inc.,” in CC Docket No. 96-98 and CC Docket 99-68 has been served on April 27, 1999 to the Parties of Record.

/s/ Mary Ann Morris
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